

2019 ETHICS UPDATE

ENVIRONMENTAL SHOW OF  
THE SOUTH  
CHATTANOOGA, TN

UT College of Law Professor Alex Long

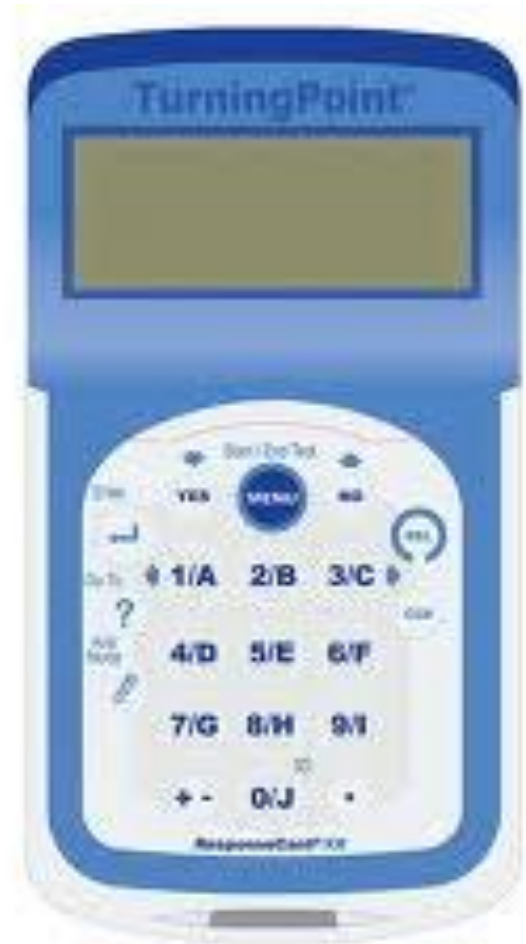


# Introduction

Program Format & Question Lineup

# Today's Program

- Questions (sometimes loosely) based on recent cases and items in the news.
- Tennessee Professional Conduct Rules will be our governing authority.
- Answer with Your Clicker.
- Discussion. Prizes. Fun!



# Question Lineup



- ❑ Toxic Waste and Confidentiality
- ❑ Conflicts of Interest in the Representation of Government Clients
- ❑ Lawyers in Trumpland
- ❑ Zealous Advocacy Meets Extortion
- ❑ Settlement Agreements and Destruction of Evidence



# *Toxic Waste and Confidentiality*

# Toxic Waste and Confidentiality



- Lawyer represents Chem Co., a chemical manufacturer.
- Lawyer also represents Supply Corp., a company that supplies material to Chem Co.
- Lawyer learns from the president of Supply Corp. that Chem Co. illegally dumps toxic waste in a nearby river.

# Toxic Waste and Confidentiality



- Lawyer does some additional investigation and learns that the president is telling the truth about the illegal dumping.
- Lawyer also learns that the water from the river is part of the local community's water supply.
- The toxic waste is making its way into the community's drinking water in an amount sufficient to increase the risk of cancer by 300%.

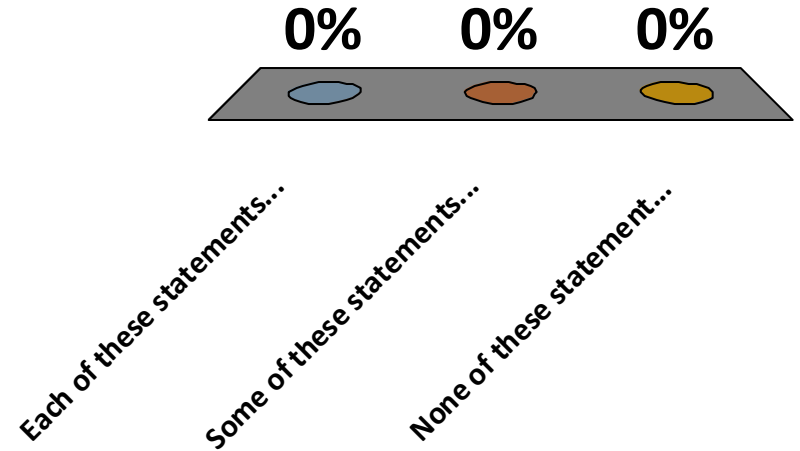
# Toxic Waste and Confidentiality

- Does the lawyer have a duty of confidentiality with respect to that information?
- If so, what is the lawyer required or permitted to do with the information, if anything?



# Does the lawyer have a duty of confidentiality with respect to the information?

- A. No, because the information is not protected by the attorney-client privilege.
- B. No, because the information did not come from the client.
- C. Both A and B.
- D. Yes.



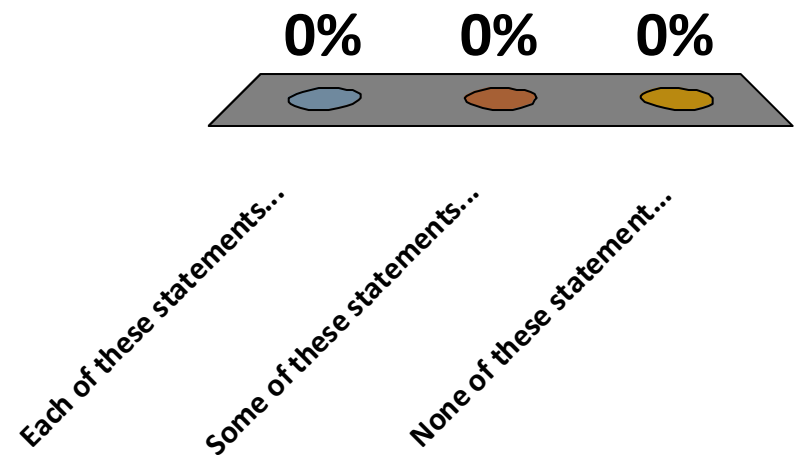
# Does the lawyer have a duty of confidentiality with respect to the information?



- Requirements of the attorney-client privilege?
- TRPC R. 1.6: A lawyer shall not reveal information relating to the representation of a client ...
  - Cmt. 3: “The confidentiality rule ... applies not only to matters communicated in confidence by the client but also to all information relating to the representation, *whatever its source.*”

# Does the lawyer have a duty of confidentiality with respect to the information?

- A. No, because the information is not protected by the attorney-client privilege
- B. No, because the information did not come from the client.
- C. Both A and B.
- D. **Yes.**

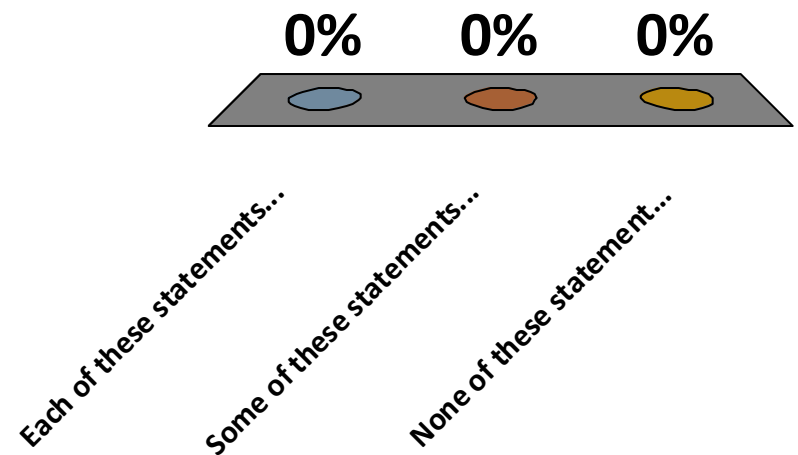


# Toxic Waste and Confidentiality

- Does the lawyer have a duty of confidentiality with respect to that information?
- ***If so, what is the lawyer required or permitted to do with the information, if anything?***

# What is the lawyer required or permitted to do with the information, if anything?

- A. The lawyer must disclose as reasonably necessary to prevent reasonably certain death or substantial bodily harm.
- B. The lawyer may disclose as reasonably necessary to prevent reasonably certain death or substantial bodily harm.
- C. The lawyer must disclose in as reasonably necessary to prevent the client from committing this crime in the future.
- D. The lawyer is not permitted to disclose the information.



# If so, what is the lawyer required or permitted to do with the information, if anything?



- TRPC R. 1.6(c): A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;

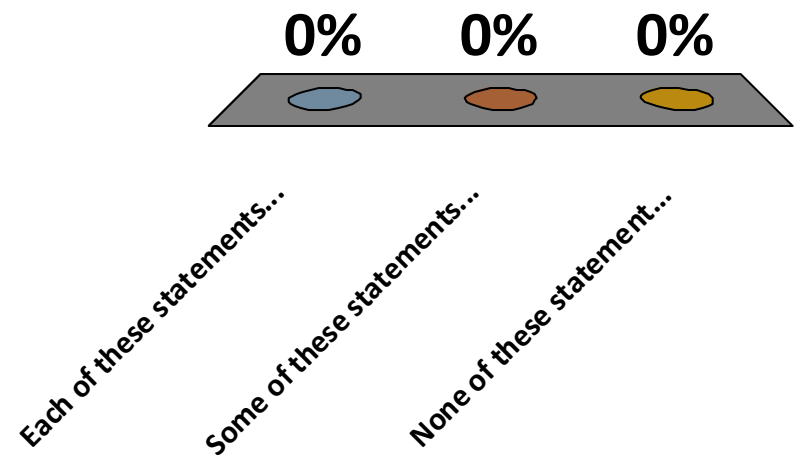
# If so, what is the lawyer required or permitted to do with the information, if anything?



- TRPC R. 1.6(b): A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary
  - (1) to prevent the client or another person from committing a crime ...

# What is the lawyer required or permitted to do with the information, if anything?

- A. **The lawyer must disclose as reasonably necessary to prevent reasonably certain death or substantial bodily harm.**
- B. The lawyer may disclose as reasonably necessary to prevent reasonably certain death or substantial bodily harm
- C. The lawyer must disclose in as reasonably necessary to prevent the client from committing this crime in the future.
- D. The lawyer is not permitted to disclose the information.







*Conflicts of Interest in the Representation  
of Government Clients*

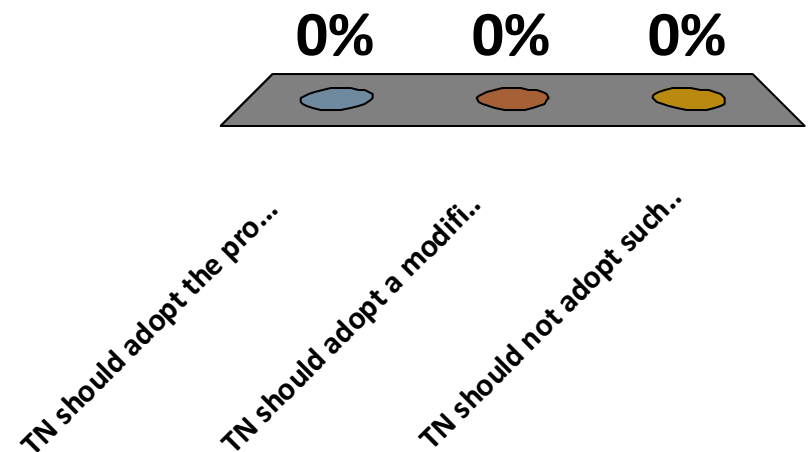
# *Conflicts of Interest in the Representation of Government Clients*



- Lawyer represents an environmental group that is suing the Tennessee Department of Environment and Conservation (TDEC) in a matter related to water pollution.
- At the same time, Lawyer represents the Tennessee Wildlife Resources Agency (TWRA), an independent state agency, in a matter related to TWRA's enforcement of boating law.

# Does the lawyer have a conflict of interest?

- A. No, because the matters are unrelated.
- B. No, because these are two separate state agencies.
- C. Yes, because both are state agencies and the lawyer is on opposite sides of the matters.
- D. It depends.



# Conflicts of Interest in the Representation of Government Clients



- Utah Eth. Op. 19-02
- TRPC R. 1.7(a): [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be **directly adverse** to another client; or
  - (2) there is a **significant risk that the representation of one or more clients will be materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

# Conflicts of Interest in the Representation of Government Clients

- Is the representation of TWRA “directly adverse” to TDEC?
- ABA Formal Ethics Opinion 97-405
  - “The lawyer may represent a private client against another government entity in the same jurisdiction in an unrelated matter, as long as the two government entities are not considered the same client, and as long as the requirements of Model Rule 1.7(b) are satisfied. The identity of the government client for conflict of interest purposes, like that of any other organizational client, will be established in the first instance between the lawyer and government officials who are authorized to speak for the government client.”
- No conflict: *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001); *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F. Supp. 153 (D.R.I. 1996);



# Conflicts of Interest in the Representation of Government Clients

- Is there a **significant risk that the representation of one or more clients will be materially limited** by the lawyer's responsibilities to another client?
- ABA Formal Ethics Opinion 97-405
  - Whether or not the lawyer's representation of a government client in one matter may be “materially limited” by her responsibilities to other clients (or vice versa) depends on the extent to which either client would be adversely affected by the outcome of the other's matter, and on whether the lawyer's diligence or judgment on behalf of one client would be compromised by her relationship or identification with the other.
  - “This in turn may depend upon the issues at stake in a matter, the particular role the lawyer is playing in it, and the intensity and duration of her relationship with the lawyers she is opposing. There may be situations in which a lawyer's representation of the government on an important issue of public policy so identifies her with an official public position that she would be effectively compromised in her ability convincingly to oppose any part of the government on behalf of a private client, even in an entirely unrelated matter.

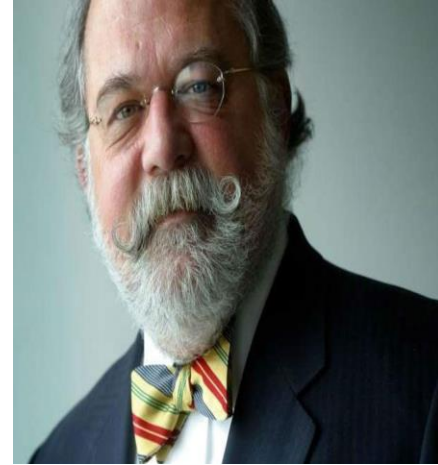




# *Lawyers in Trumpland*

# Lawyers in Trumpland

- Which one of the following White House lawyers or personal lawyers for Donald Trump engaged in a conversation regarding the Russia investigation at a table outside a restaurant right next to a *New York Times* reporter in which the lawyer complained about the White House legal defense strategy?



Ty Cobb



Roy Cohn



Don McGahn

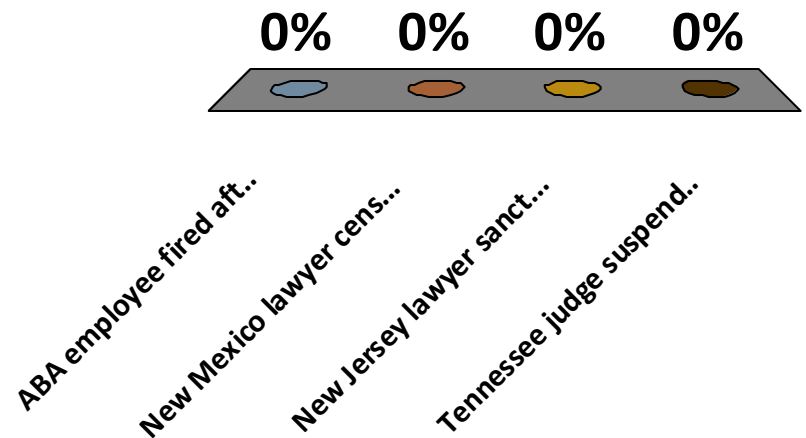


Michael Cohen



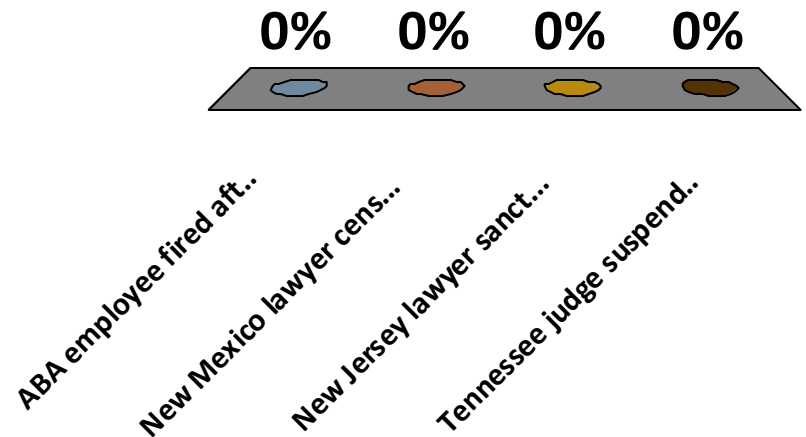
Which of the following complained about White House legal defense strategy within earshot of the *New York Times*?

- A. Ty Cobb
- B. Roy Cohn
- C. Don McGahn
- D. Michael Cohen



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- A. **Ty Cobb**
- B. Roy Cohn
- C. Don McGahn
- D. Michael Cohen

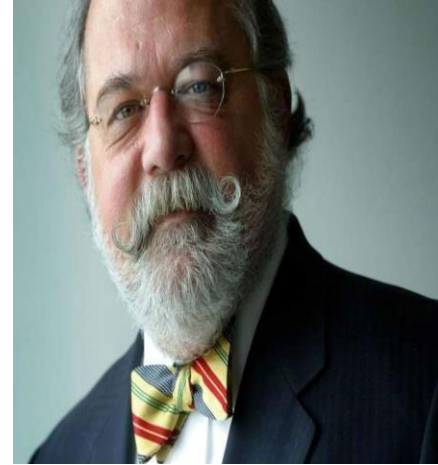


# A Lawyer's Duty of Confidentiality

- TRPC Rule 1.6(d): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

# Lawyers in Trumpland

- Which one of the following White House lawyers or personal lawyers for Donald Trump secretly recorded conversations with Donald Trump in addition to pleading guilty to numerous federal criminal charges ?



Ty Cobb



Roy Cohn



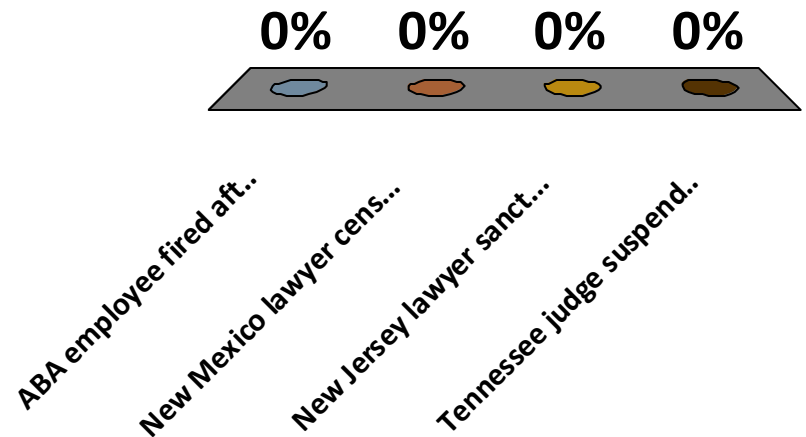
Don McGahn



Michael Cohen

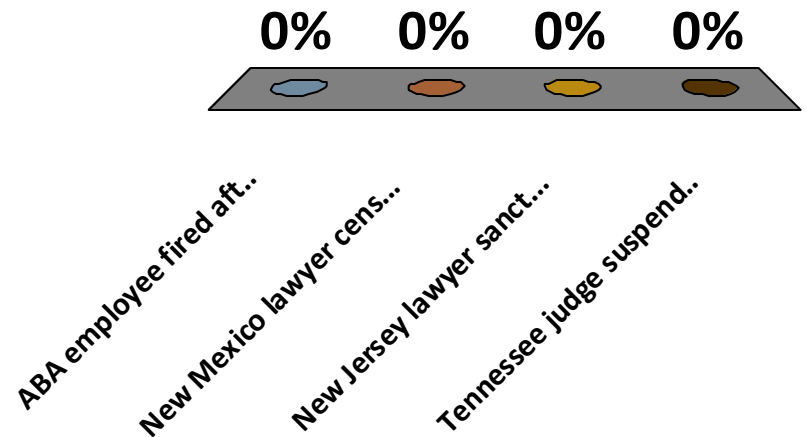
Which of the following secretly recorded conversations with Donald Trump and pleaded guilty to several criminal charges?

- A. Ty Cobb
- B. Roy Cohn
- C. Don McGahn
- D. Michael Cohen



Which of the following secretly recorded conversations with Donald Trump and pleaded guilty to several criminal charges?

- A. Ty Cobb
- B. Roy Cohn
- C. Don McGahn
- D. **Michael Cohen**

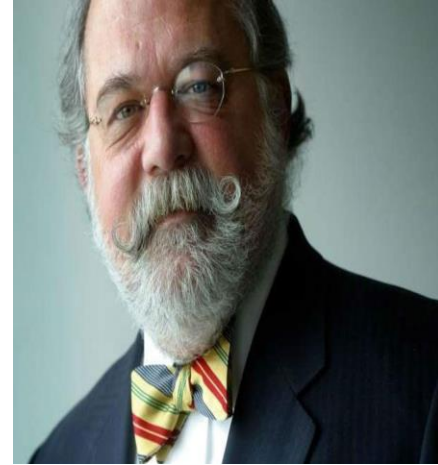


# Respect for the Rights of Third Persons and Misconduct

- TRPC Rule 4.4(a): In representing a client, a lawyer shall not:
  - (1) ... knowingly use methods of obtaining evidence that violate the legal rights of such a person;
    - Comment [1]: a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded.
- TRPC Rule 8.4: (b) It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects

# Lawyers in Trumpland

- During a meeting with White House lawyers, President Trump complained that one of his lawyers was taking notes. Which one of the following White House lawyers or personal lawyers for Donald Trump told the president that he took notes “because I’m a real lawyer.”



Ty Cobb



Roy Cohn



Don McGahn



Michael Cohen

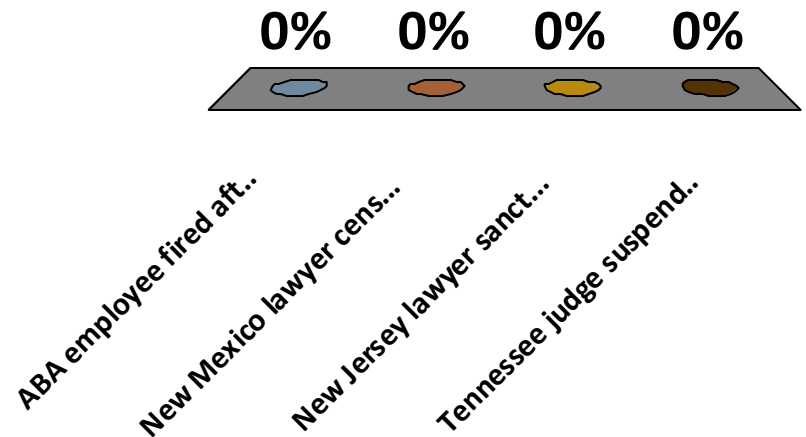


# A Lawyer's Duties of Competence and Confidentiality

- TRPC Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
  - ▣ Disorganization and poor recordkeeping as part of the basis for discipline: *Grievance Comm'n v. Sapero*, 400 Md. 461, 486, 929 A.2d 483, 498 (2007);
  
- TRPC Rule 1.6(d): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

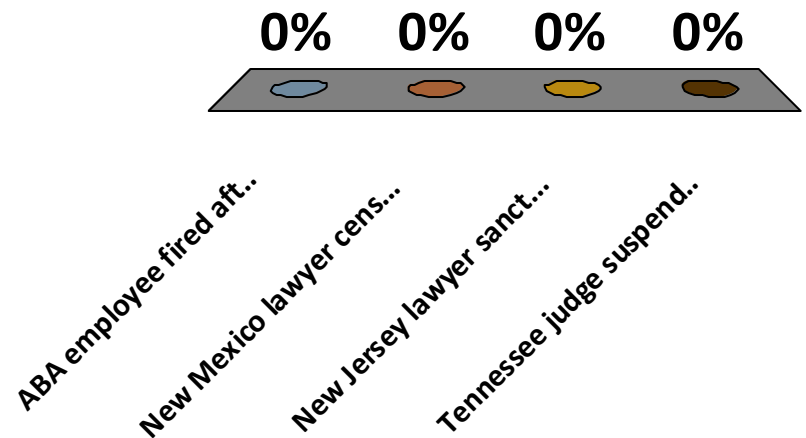
Which of the following explained that he takes notes because he is a “real lawyer?”

- A. Ty Cobb
- B. Roy Cohn
- C. Don McGahn
- D. Michael Cohen



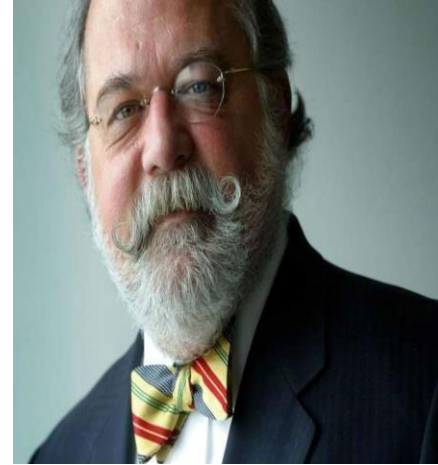
Which of the following explained that he takes notes because he is a “real lawyer?”

- A. Ty Cobb
- B. Roy Cohn
- C. **Don McGahn**
- D. Michael Cohen



# Lawyers in Trumpland

- In response to the comment that real lawyers take notes, President Trump pointed to one of his former lawyers as an example of a great lawyer who did not take.
- To whom was President Trump referring?



Ty Cobb



Roy Cohn



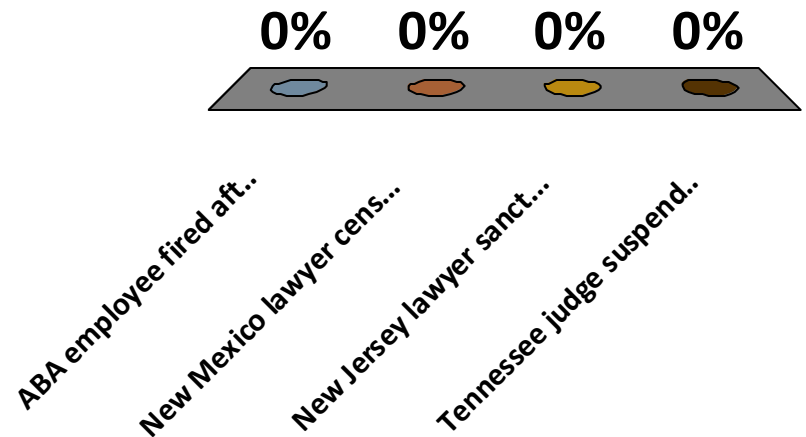
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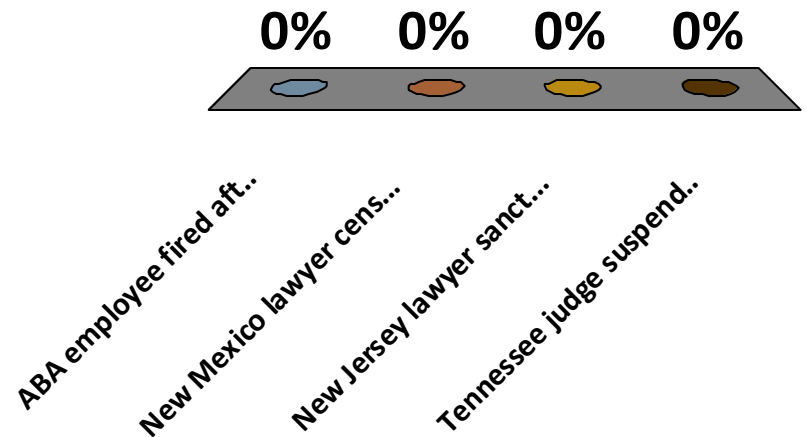
Which of the following was the “great lawyer” who didn’t take notes?

- A. Ty Cobb
- B. Roy Cohn
- C. Don McGahn
- D. Michael Cohen



Which of the following was the “great lawyer” who didn’t take notes?

- A. Ty Cobb
- B. Roy Cohn**
- C. Don McGahn
- D. Michael Cohen



# Roy Cohn



Disbarred in 1986 for engaging in “dishonesty, fraud, deceit and misrepresentation.”

- Cohn held the hand of a dying, senile, semi-comatose client to sign a document naming Cohn a co-executor of the client's will after falsely telling him that the document dealt with his divorce.
- Other misconduct leading to disbarment:
  - Refused to repay a \$100,000 loan from a client and lied about it in court;
  - violated an escrow order, allowing dissipation of a corporation's assets in a securities-fraud case,
  - concealed pending disciplinary proceedings on an admission application to the District of Columbia Bar.

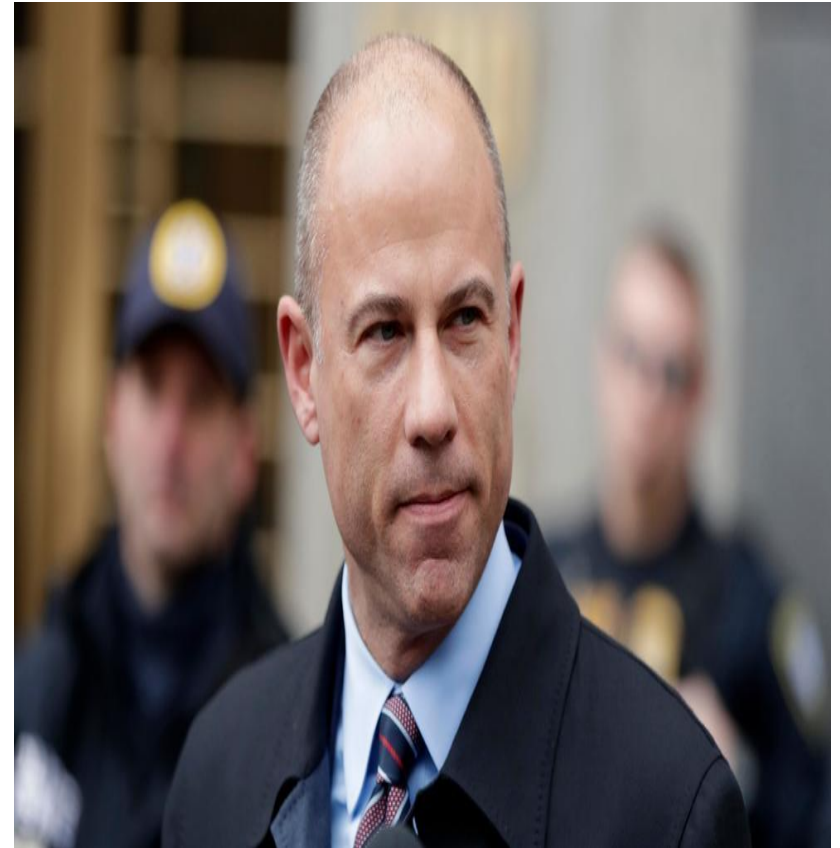


# *Zealous Advocacy Meets Extortion*



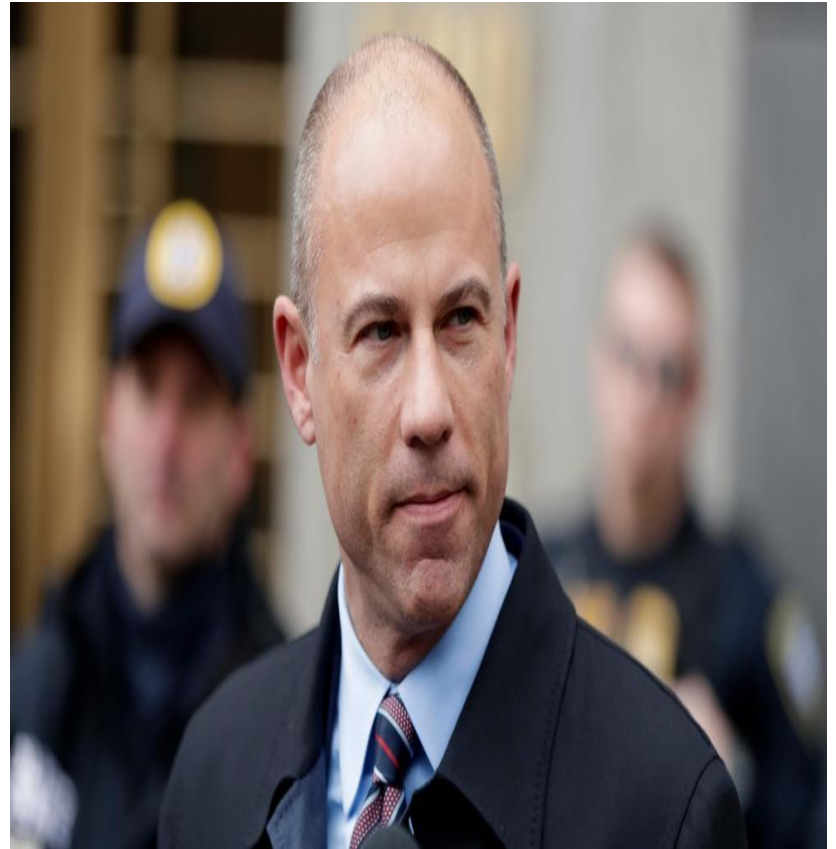
# Extortion Charges Facing Michael Avenatti

- In the course of representing a client who had a contractual dispute with Nike, Avenatti told Nike that he had evidence that Nike had made illegal payments to the families of high school basketball players.



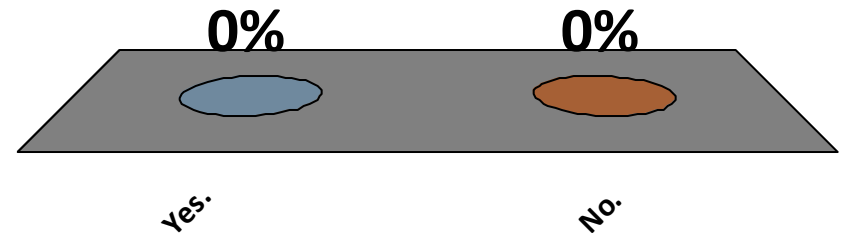
# Extortion Charges Facing Michael Avenatti

- The demand:
  - ▣ If Nike did not pay his client, Avenatti said he would publicize Nike's alleged illegal conduct and "take ten billion dollars off your client's market cap."
  - ▣ [Avenatti was arrested shortly after tweeting that he was going to hold a press conference to disclose the alleged Nike scandal.]



Assume the Tennessee Rules of Professional Conduct apply. Is Avenatti subject to discipline for threat to damage Nike's business?

- A. Yes.
- B. No.

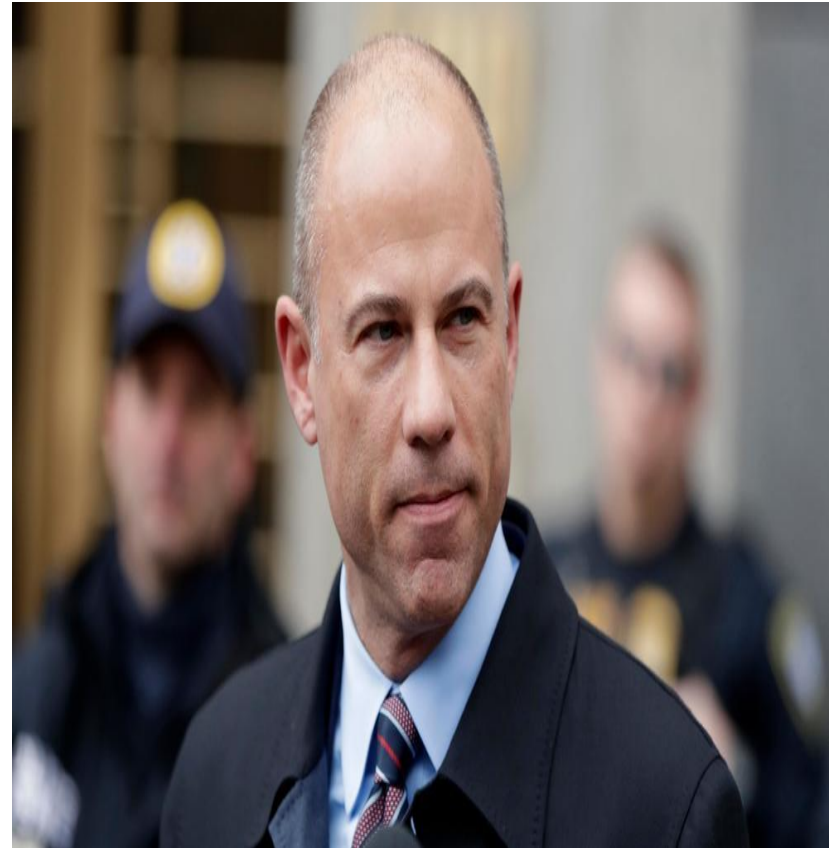


# Zealous Advocacy Meets Extortion

- TRPC Preamble and Scope, comment 10: A lawyer has an obligation “zealously to protect and pursue a client's legitimate interests, *within the bounds of the law ...*”
- TRPC Rule 4.4(a): A lawyer shall not
  - ▣ (1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or
  - ▣ (2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

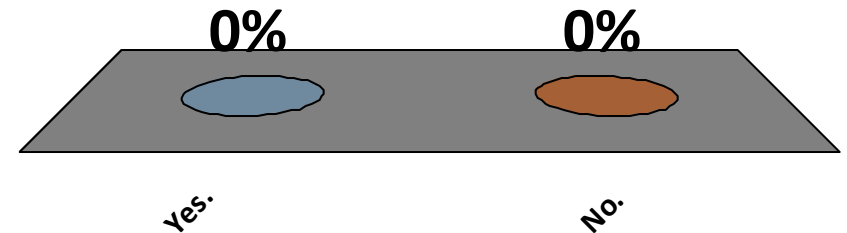
# Extortion Charges Facing Michael Avenatti

- The additional demand:
  - ▣ In addition, Avenatti demanded that Nike pay him and another lawyer more than \$20 million to conduct an internal investigation into Nike's practices.



# Does Avenatti's demand that Nike pay him \$20 million amount to a violation of the same rule?

- A. Yes.
- B. No.

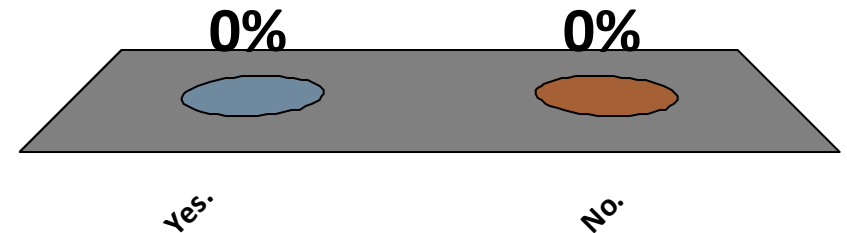


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  - ▣ (2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

# Does Avenatti's demand that Nike pay him \$20 million to conduct an internal investigation amount to extortion?

- A. Yes.
- B. No.





# Zealous Advocacy Meets Extortion

- TN Code § 39-4-112(a)(1) criminalizes “coercion upon another person with the intent to [o]btain property, services, any advantage or immunity.”
- TN Code § 39-11-106(a)(3: “Coercion” defined as a threat, however communicated, to, *inter alia*, commit any offense; wrongfully accuse any person of any offense; expose any person to hatred, contempt or ridicule; harm the credit or business repute of any person; or take or withhold action as a public servant or cause a public servant to take or withhold action. (emphasis added).
- When a person’s threat moves from the pursuit of legitimate ends “to personal payoffs, then the actions become extortionate.” *Moore v. State*, 519 S.W.2d 604, 608 (Tenn. Ct. Crim. App. 1974) (quoting *United States v. Enmons*, 410 U.S. 396, 406 n. 16, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1972)).



# *Settlement Agreements and Destruction of Evidence*

# Settlement Agreements and Destruction of Evidence

- Lawyer represents a client in a products liability action involving a defective car.
- As a condition of settlement, Defendant insists that the car be destroyed.

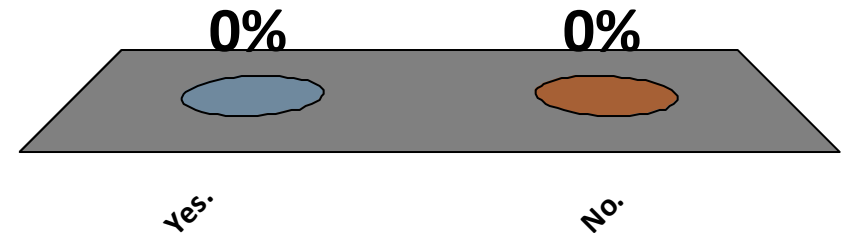


# Settlement Agreements and Destruction of Evidence

- Lawyer represents a client in a products liability action involving a defective car.
- As a condition of settlement, Defendant insists that the car be destroyed.
- TRPC Rule 5.6(b): “A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”
- TRPC Rule 3.4(a): “A lawyer shall not obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act...”

# Can Lawyer ethically agree to the demand to destroy the car as part of the settlement?

- A. Yes.
- B. No.



# Settlement Agreements and Destruction of Evidence

- **Tennessee Formal Ethics Opinion No. 2019-F-167**
  - Settlement conditions are prohibited by Tennessee Rules of Professional Conduct 5.6(b), if such conditions will restrict the attorney's representation of other clients.
  - It is improper for an attorney to propose or accept a provision in a settlement agreement that requires an attorney in a products liability lawsuit to destroy the product alleged to be defective, as a material condition of settlement, if that action will restrict the attorney's representation of other clients.



## *Authorized and Unauthorized Disclosure of Information*

*Inadvertent Disclosure of Information and  
Intentional Disclosure of Information (for a Price)*

# Inadvertent Disclosure of Information

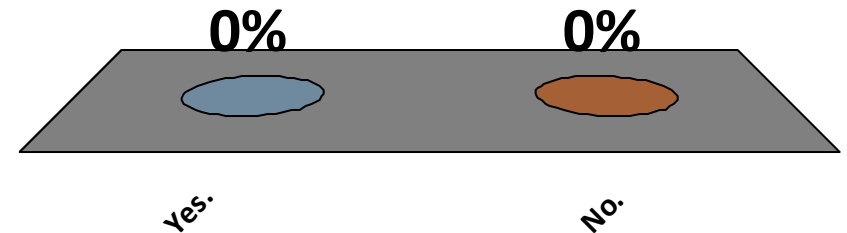
- Lawyer receives an email from the Opposing Lawyer that contains confidential information concerning the case.
- It is obvious to Lawyer that the email was inadvertently sent to Lawyer.





# What must Lawyer do after receiving this email?

- A. Terminate review of the email and notify the sender of the disclosure.
- B. Delete the email.
- C. Allow the client to decide what to do with the email.
- D. Nothing. Lawyer is free to make use of the information in the email.

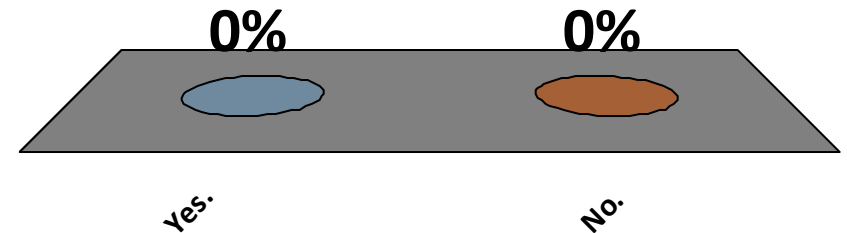


# Inadvertent Disclosure of Information

- TRPC Rule 4.4(b): A lawyer who receives information (including, but not limited to, a document or electronically stored information) relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such information to the lawyer, shall:
  - (1) immediately terminate review or use of the information;
  - (2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and
  - (3) abide by that person's or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

# What must Lawyer do after receiving this email?

- A. **Terminate review of the email and notify the sender of the disclosure.**
- B. Delete the email.
- C. Allow the client to decide what to do with the email.
- D. Nothing. Lawyer is free to make use of the information in the email.



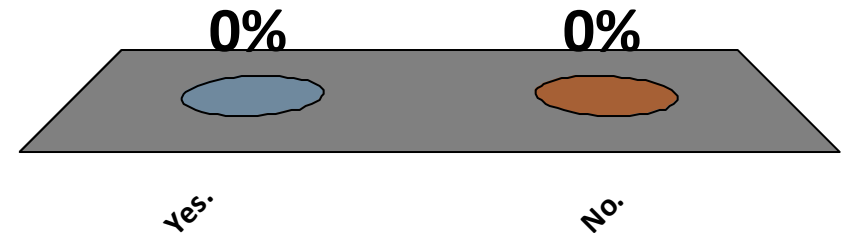
# Intentional Disclosure of Information (for a Price)

- Lawyer #1 formerly represented a client a matter related to Lawyer #2's representation of a client in an ongoing matter.
- Lawyer #1 approaches Lawyer #2 and offers to pass information highly useful to Lawyer #2's case if Lawyer #2 pays him \$25,000.
- The information Lawyer #1 seeks to sell is covered by a non-disclosure agreement as part of the settlement in the prior case



# May Lawyer #2 ethically obtain this information by purchasing it from Lawyer #1?

- A. Yes.
- B. No.



# Intentional Disclosure of Information (for a Price)

- TRPC Rule 4.4(a): In representing a client, a lawyer shall not:
  - ▣ (1) ... knowingly use methods of obtaining evidence that violate the legal rights of such a person
- TRPC Rule 8.4(d): It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice
- TRPC Rule 3.4(h): It is professional misconduct for a lawyer to ... pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his or her testimony or the outcome of the case.



# Intentional Disclosure of Information (for a Price)

- Alaska Ethics Op. No. 2019-1
  - Declines to articulate a bright-line rule, but ...
  - this type of conduct carries significant risks of violating third parties' rights and crossing the line from evidence-gathering to “buying” favorable testimony
  
- *In re Sablowsky*, 529 A.2d 289 (D.C. 1981)  
(attempt to sell evidence is conduct prejudicial to the administration of justice)
  
- New York State Bar Ass'n Ethics Op. 997 (2014):  
A lawyer may in general pay for **physical evidence** in connection with contemplated or pending litigation, and such payment may be contingent on the outcome of the matter. There are limitations, however, such as when the transaction involves witness payments.



# Thank You

- Email with any questions about today's CLE.  
--Alex Long (along23@utk.edu)

